SUBJECT INDEX

	Page
TABLE OF AUTHORITIES	i
REPORTS OF OPINIONS BELOW	1
STATEMENT OF JURISDICTION OF THIS COURT	2
QUESTION PRESENTED FOR REVIEW	2
STATUTE INVOLVED	3,4
STATEMENT OF THE CASE	4-6
REASONS FOR GRANTING THE WRIT	6-14
CONCLUSION	14-15
APPENDIX A-FIFTH CIRCUIT OPINION	16-17
APPENDIX B-DISTRICT COURT OPINION	18-25
APPENDIX C-OPINION IN MARY LOU SCHAEFFER v. SAN DIEGO YELLOW CABS, INC., JUNE 20, 1972, _____ F.2d _____, 4. FEP Cases (BNA) 946-950	32-41

TABLE OF AUTHORITIES - Page 1

Cases:	Page
Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. Sep. 26, 1969)	10,11, 13,14
Cheatwood v. South Central Bell Telephone Co., 303 F.Supp. 754 (MD Ala. July 31, 1969)	10
Kober v. Westinghouse Electric Corp., 325 F.Supp. 467 (W.D. Pa. 1971)	13
LeBlanc v. Southern Bell Telephone and Telegraph Co., 333 F.Supp.602, at 609, Appendix B	5,11
Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969)	13
Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971)	13
Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971)	12
Rosenfeld v. Southern Pacific Company, 293 F.Supp.1219 (C.D.Calif. Nov. 22, 1968) aff'd, 444 F.2d 1219 (9th Cir. 1971)	7,9,10
Schaeffer v. San Diego Yellow Cabs, Inc., June 20, 1972, ____ F.2d ____, 4. FEP Cases (BNA) 946-950, Apperdix C	6,7,8, 9,13,14

TABLE OF AUTHORITIES - Page 2

	Page
Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. March 4, 1969) ----------	10

Statutes:

Federal Statutes:

Civil Rights Act of 1964, Pub. L. 88-352 Title VII, July 2, 1964 78 Stat. 259, as amended by Pub. L. 92-261, Section 4, March 24, 1972, 816 Stat. 104:	
§ 706, 42 U.S.C. § 2000e-5(e-k) ---	2,3,4,6, 9,12,14
28 U.S.C. § 1254 (1) ----------	2
28 U.S.C. § 2101 (c) ----------	2

Louisiana Statutes:

La. R. S. of 1950 (LSA West Pub. Co. Ed.) 23: § 311,332 ----------	5

Other:

Equal Employment Opportunity Commission Guidelines, August 11, 1969, 29 C.F.R. § 1604.1 (b), 34 Fed. Reg. 13,368 ----------	10

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. _____

GLORIA KENDALL LEBLANC and
HELEN JENKINS ROIG

PETITIONERS

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. and
STATE OF LOUISIANA

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners LeBlanc and Roig respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on May 25, 1972.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals below has not yet appeared in the Federal Reporter 2nd, but is reported in 4 FEP Cases (BNA) at 818-819 and is annexed hereto as

Appendix A, pp. 16-17. The opinion of the U. S. District Court, E.D. La., N.O. Div., is reported in 333 F. Supp. at 602-611, 3 FEP Cases (BNA) 1083-1090, and is annexed as Appendix B, pp. 18-25.

STATEMENT OF JURISDICTION OF THIS COURT

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit are dated May 25, 1972, and were entered on that date. Rehearing was not sought by any party. No extension of time within which to petition for writ of certiorari was requested. This petition for certiorari is being filed within 90 days of the entry of the opinion and judgment of the Court of Appeals. 28 U.S.C. Section 2101 (c). The jurisdiction of this Honorable Court to review the judgment of the Court of Appeals below is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

This petition is limited to the question of whether otherwise successful plaintiffs in a Title VII, Civil Rights Act of 1964 suit (equal employment opportunity discrimination action brought under Section 706, Civil Rights Act of 1964, 42 U.S.C. Sections 2000e et seq., particularly Section 2000e-5 (e)(f)(g)(h)(i)(j) & (k)) are entitled, under the circumstances of this case, to an award of damages in the nature of differential back pay and employee benefits.

STATUTE INVOLVED

Petitioners seek relief by way of an award for damages under Section 706 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(g), which on the date these actions were filed read as follows:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than

> discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title."

This section was amended by Pub.L. 92-261, § 4, March 24, 1972, 86 Stat. 104, by adding after the words "and order such affirmative action as may be appropriate, which may include," the following:

> "but is not limited to, reinstatement or hiring of employees, with or without back pay(payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." (The remainder of the section was retained as above quoted)

Inasmuch as Section 14 of Pub.L.92-261 provides that this amendment to Section 706 applies only with respect to charges pending with the Commission on the date of its enactment, March 24, 1972 and all charges filed thereafter, petitioners concede that the amendment has no applicability in this case other than for argument as to Congressional intent, but mention it here for the purpose of setting forth the statute completely.

STATEMENT OF THE CASE

Petitioners, veteran employees of the respondent telephone company, filed these Title VII (Civil Rights Act of 1964) suits

charging discrimination against them solely on the basis of their sex by respondent's continued refusal to consider their bids for the much higher paying job of test deskman. Respondent readily admitted the employment discrimination, but defended on the ground of its good faith reliance upon Louisiana protective statutes regulating the maximum working hours of women, La. R. S. 23:311, 332 The district court held the Louisiana statutes pre-empted by the Civil Rights Act under the Supremacy Clause of the U. S. Constitution. LeBlanc v. Southern Bell Telephone and Telegraph Co., 333 F. Supp. 602, at 609, Appendix B, p.26. After further holding that respondent "intentionally engaged in" an unlawful employment practice, and that "plaintiffs have made out a prima facie case for the recovery of damages," (LeBlanc, supra, 333 F. Supp. at 610, Appendix B, p.28) the district court limited its relief to a judgment declaring the Louisiana protective statutes invalid and awarding reasonable attorneys' fees for plaintiffs' counsel.

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit from that part of the judgment denying monetary damages for the differential back pay and employee benefits petitioners would have earned had they been employed as test deskmen from the time each first applied for the job (for LeBlanc, from July 8, 1965; for Roig, from March 15, 1966) until they actually were awarded the jobs on November 22, 1971, one and one-half months after the district court rendered its opinion. Essentially, petitioners' plea is for just compensation for the six year period it took to litigate their concedely valid charges of employment discrimination from the Equal

Employment Opportunity Commission to judgment in the district court.

The State of Louisiana, not cited as a party to this litigation, was invited by the district court to defend its statutes, after the case had been tried on the merits. These suits were filed in April of 1967, tried in May of 1970, the State of Louisiana invited to participate in late 1970, and the opinion of the district court was filed on October 4, 1971. The State of Louisiana then formally intervened and cross-appealed from that portion of the judgment declaring the Louisiana statutes invalid.

The Court of Appeals, after full oral argument, rendered a per curiam opinion affirming the district court on the ground that the award of back pay is discretionary under the statute, 42 U.S.C. Section 2000e-5(g), set forth fully supra, p. 3, and no abuse of discretion of the district court had been shown.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE HOLDING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF SCHAEFFER V. SAN DIEGO YELLOW CABS, INC. JUNE 20, 1972, F.2d , 4. FEP Cases (BNA) 946-950, APPENDIX C, pp. 32-41.

On its facts, this case is indistinguishable from Schaeffer v. San Diego Yellow Cabs, Inc., supra, Appendix C. Schaeffer was hired as a female taxicab driver and allowed to work only eight hours per day, while her male

counterparts were allowed to work nine hours. The company's sole justification for the discrimination was its good faith compliance with the limitation of hours of women regulations in California's labor code and the order of its industrial welfare commission. When suit was filed in October of 1969, the defendant announced it would allow its female drivers to work the nine-hour day, but plaintiff sought back pay for the one hour per day from October of 1966, when she first requested to work the extra hour. The district court, as in this case, declared the state protective legislation and regulations invalid and awarded attorney's fees. The court denied damages for back pay and refused to issue an injunction, since the company ceased the employment discrimination at the same time the suit was filed. On Schaeffer's appeal, the Ninth Circuit reversed in part and remanded, holding plaintiff "entitled to receive back pay for the extra hour per day from the date when the Company had knowledge of both the Rosenfeld case [Rosenfeld v. Southern Pacific Company, 293 F. Supp. 1219 (C.D.Calif. Nov. 22, 1968), aff'd, 444 F.2d 1219 (9th Cir. 1971)] and the Commission's [EEOC] decision in favor of Schaeffer (i.e., on some undetermined date subsequent to 1/22/69, to and including 10/7/69, the date the company allowed 9-hour daily employment for women." Appendix C. p. 38.

The Schaeffer court rejected the argument so far successfully advanced by respondent to writ here that the employer should not be held for claims of back pay until a final court decision strikes down the state laws relied upon in good faith. The reason given by the Ninth Circuit is that "[i]t is unfair to force an innocent employee to forego his rights under law while litigation drags through the courts ...." Appendix C. pp. 38-39. That is exactly the point here! Petitioners began their quest for the test deskman's job shortly after the Civil Rights Act became effective on July 1, 1965. Because of the statutory requirements for filing charges with the EEOC and having to wait for a suit letter as a basis for jurisdiction, these suits could not be filed until April of 1967. Respondent delayed filing responsive pleadings until its preliminary motions were fully litigated, and trial was not had before the district court until May of 1970. The decision was not rendered until October of 1971. The company finally promoted petitioners, as it had represented it would do, after judgment was filed by the district court.

If this Court were to apply the Schaeffer holding to this case, petitioners' awards for the difference in pay they received on their jobs and what they would have earned as test deskman, just from January,

1969 until November, 1971, would amount to thousands of dollars. These ladies are now earning, not considering the overtime, almost double what they were paid before. When the overtime is added, the amounts are staggering!

The Schaeffer case, supra,makes no mention of the discretion granted the courts in fashioning remedies under Title VII. Rather, the court speaks of the proper balance between the company and the employee, concluding that an award of back pay should be made only when "appropriate" under the Act (42 U.S.C. § 2000e-5(g), supra). This requires the court to balance the equities between the parties and achieve a result consistent with the purposes of the Act and fundamental concepts of fairness. In each case, the merits of the discriminatee's claim should be weighed against the hardship imposed upon the employer. In Schaeffer's case, the court held the employer had every right to rely upon state statutes prohibiting women from working the ninth hour until Rosenfeld, supra, was decided, but by that time and the time the EEOC reversed its policy, the company could no longer deny women the extra hour and still be in good faith and avoid the damages which resulted from its discrimination. It should be remembered that by the time Schaeffer filed suit, the company had already discontinued its discrimination, and she was allowed to

work the extra hours!

In the case at bar, petitioners did not achieve an end to the discrimination against them until after the district court ruled! The respondent company, fully advised by its most competent battery of counsel, chose to ignore the emerging jurisprudence and the reversal of policy by the EEOC, content to fight petitioners to a decision in this case, striking down the Louisiana laws which were obviously invalid by August of 1969 at the latest. Can the company deny full knowledge of the trend of the law in this area when it participated in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. March 4, 1969)? The Equal Employment Opportunity Commission changed its position with regard to the validity of such state statutes in 1968, and on August 11, 1969 published new Guidelines, 29 C.F.R. Section 1604.1(b), 34 Fed. Reg. 13,368. Even before, came Rosenfeld v. Southern Pacific Company, supra, as early as November, 1968. This same respondent defended Cheatwood v. South Central Bell Telephone Co., 303 F. Supp. 754 (MD Ala. July 31, 1969). Shortly thereafter the Seventh Circuit joined the chorus of courts across the nation proclaiming an end to discrimination against women in job opportunity caused by so-called protective laws of states in the case of Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. Sep. 26, 1969). There, full back pay was ordered!

The true test as to whether affirmative relief should be granted in cases of employment discrimination under the Act should turn on the intentional character of the discrimination. Here, it is the specific factual finding of the district court that respondent company deliberately discriminated against petitioners, and they "have made out a prima facie case for the recovery of damages." 333 F. Supp. at 610, Appendix B, p. 28. It is submitted that on this finding of fact, the district court erred in not awarding back pay.

2. THE PRIMARY PURPOSES OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ARE THWARTED BY THE DENIAL OF BACK PAY AWARDS IN CASES SUCH AS THIS. A DECISION BY THE SUPREME COURT IS NEEDED FOR THE GUIDANCE OF THE LOWER FEDERAL COURTS.

In Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), the court remarked that in this area the public interest is dependent upon private suits, and the plaintiff acts as a private attorney-general vindicating a policy that Congress considers of the highest priority:

> "The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it. To permit only injunctive relief in the class action would frustrate the implementation of the strong Congressional purpose expressed in the Civil Rights Act of 1964.
>
> * * *

"42 U.S.C. 2000e-5(g) requires that if the court finds an intentional unlawful employment practice, it may enjoin the practice 'and order such affirmative action as may be appropriate.' This grant of authority should be broadly read and applied so as to effectively terminate the practice and make its victims whole.

* * *

"In the instant case, this requires that all those who were discriminatorally laid off be compensated at the highest rate of pay for such jobs as they would have bid on/and qualified for if a non-discriminatory seniority scheme would have been in existence." 416 F.2d at 720-21.

In Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971), inter alia, defendant argued that awarding back pay is improper in light of the unsettled state of the law (this was a racial discrimination case under Title VII). The court's answer is:

"...back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition." 444 F.2d at 804.

Plaintiffs seeking the enforcement

of Title VII rights are unlikely to bear the expense, delay, notoriety and the risk of harassment necessary to secure public rights when there is little or no hope of recovering their personal losses. While petitioners here may well be said to have won the battle in securing the much more rewarding job of test deskman, in their own minds, they have indeed lost the war to recoup the loss of thousands of dollars they should have earned while this litigation dragged in the district court. The denial of back pay here rewards the slack and recalcitrant employer, and establishes precedent which will have the effect of discouraging suits to enforce Title VII rights, deemed by the Congress to be of the highest priority. The decision of the Fifth Circuit here is nothing less than an incentive for discriminating employers to resist compliance with the law with impunity.

In short, there are now decisions from the Seventh and Ninth Circuits (Bowe v. Colgate-Palmolive Company, supra, p. 11 and Schaeffer v. San Diego Yellow Cabs, Inc., supra, p. 6) awarding back pay under the same circumstances as are presented here, while the instant case of the Fifth Circuit, and district court opinions in Kober v. Westinghouse Electric Corp., 325 F. Supp. 467 (W.D. Pa. 1971); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971); and Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969) hold otherwise. The time is ripe for this Honorable Court to give purpose and direction in this expanding field of law and to decide once and for all whether private plaintiffs vindicating public rights are to be accorded just compensation for the very real losses

they suffer by reason of employment discrimination. Never was the old adage "Justice delayed is justice denied" more applicable than in the present case. If the decision here is allowed to stand, how many more frustrated victims of discrimination will array themselves in the fruitless confrontation to vindicate the public right? Is indeed the remedy of 42 U.S.C. § 2000e-5(g) a hollow one, or none at all?

CONCLUSION

Petitioners contend that the Act grants to them an award of back pay in this case. The decisions of the district court and the Fifth Circuit are palpably in error in their denial. Furthermore, the decree and opinion of the Court of Appeals for the Fifth Circuit is in direct conflict with the decision of the Ninth Circuit in Schaeffer, supra, and that of the Seventh Circuit in Bowe, supra.

Finally, it is submitted that this most important issue of the scope of the remedial provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), need to be interpreted by this Honorable Court to give direction and guidance to the Federal courts in adjudicating with some uniformity the rights and obligations of suitors under the Act.

For these reasons, a writ of certiorari should issue to review the judgment

and opinion of the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED

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New Orleans, La. 70116
Counsel for Petitioners

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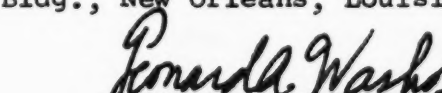
CERTIFICATE OF SERVICE

I, Leonard A. Washofsky, attorney for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1972, I served three copies of the foregoing petition for certiorari on South Central Bell Telephone Company by mailing same, in a duly addressed envelope, with first class postage prepaid, to Michael J. Molony, Jr. and Robert K. McCalla, counsel for respondent, at their offices 225 Baronne Street, New Orleans, Louisiana 70112, and the State of Louisiana, through William J. Guste, Jr., Attorney General, 104 Supreme Court Bldg., New Orleans, Louisiana 70112.



LEONARD A. WASHOFSKY

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3402

GLORIA KENDALL LeBLANC and
HELEN JENKINS ROIG,
Plaintiffs-Appellants-
Cross Appellees,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH
COMPANY,
Defendant-Appellee,

STATE OF LOUISIANA,
Defendant-Intervenor-
Cross Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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(May 25, 1972)

Before BROWN, Chief Judge, RIVES and CLARK, Circuit Judges.

2 LeBLANC v. SOU. BELL TELE. & TELEGRAPH CO.

PER CURIAM: In this Title VII[1] suit the District Court granted a judgment declaring invalid certain Louisiana protective statutes[2] limiting the hours women may work. The lone tag end of this litigation involves the contention that the District Court erred in not granting back pay to the otherwise successful plaintiffs from the date of their EEOC charges. Congress granted broad discretion to the District Court to fashion remedies in Title VII cases as the equities of the particular case compel.[3] The plaintiffs have not sustained their burden of showing that the District Court abused this discretion in declining to allow back pay for the reasons set forth in its opinion. *LeBlanc v. Southwestern Bell Telephone & Telegraph Co.*, E. D. La., 1971, 333 F. Supp. 602, 610-11.

AFFIRMED.

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[1]Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e et seq.
[2]La. Rev. Stat. §§ 23:311, 314, 332, 337.
[3]The remedial provisions of Title VII provide that

> "if the court finds that the respondent has intentionally engaged in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay, * * * or any other equitable relief as the court deems appropriate."
> 42 U.S.C.A. § 2000E-5(g).

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

GLORIA KENDALL LeBLANC	CIVIL ACTION
versus	NO. 67-573
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY	SECTION B
HELEN JENKINS ROIG	CIVIL ACTION
versus	NO. 67-574
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY	SECTION B
	(CONSOLIDATED CASES)

Victor H. Hess, Jr., Leonard A. Washofsky, Jackson & Hess, New Orleans, Louisiana

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Kenneth M. Davidson, Buffalo, New York; Robert Ellis Palmer, Amite, Louisiana

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Amicae Curiae

Elizabeth Boyer, Novelty, Ohio; Sylvia Roberts, Baton Rouge, Louisiana

for Women's Equity Action League
Amica Curiae

Samuel H. Collins, New Orleans, Louisiana

for Communications Association for Equal Opportunity, Inc.
Amicus Curiae

Philip B. Sklover, David Zugschwerdt, Washington, D. C.; Charles M. White, New Orleans, Louisiana

for Equal Employment Opportunity Commission
Amicus Curiae

Jack P. F. Gremillion, Attorney General, State of Louisiana; William P. Curry, Jr., Special Counsel, New Orleans, Louisiana

for State of Louisiana
Amicus Curiae

> "Don't ask fr rights. Take thim. An' don't let anny wan give thim to ye. A right that is handed to ye fr nawthin' has somethin' th' matter with it." [Finley Peter Dunne: On Woman Suffrage.]

HEEBE, District Judge:

On July 8, 1965, and again on February 28, 1967, plaintiff Gloria Kendall LeBlanc, an employee of the Southern Bell Telephone and Telegraph Company (hereinafter the Telephone Company) since 1954, applied in writing to the Telephone Company for a promotion to the position of test deskman. Plaintiff Helen Jenkins Roig, a Telephone Company employee since 1955, likewise applied for the same job opening on March 15, 1966, and on February 28, 1967. All applications were similarly rejected by letters from the Telephone Company informing plaintiffs that the Telephone Company did not promote women to the test deskman position.

Both plaintiffs filed appropriate charges with the Equal Employment Opportunity Commission (hereinafter EEOC). After many months of conciliation efforts by the EEOC failed, the EEOC on March 22, 1967, sent both plaintiffs a letter informing them of the conciliation failure and of their right to sue their employer for the alleged violations within thirty days.[1]

Alleging that they had been denied promotion solely because of their sex, plaintiffs filed this action against the Telephone Company. They alleged a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and sought injunctive relief and monetary damages. The Telephone Company admitted that they had not promoted plaintiffs but denied that they had engaged in any employment practice violative of Title VII. Rather, they claimed, any failure to promote plaintiffs was dictated by certain Louisiana criminal statutes, La.Rev.Stat. §§ 23:311, 332, which prohibit employers from requiring female employees to work in excess of the maximum hours limitations imposed by the statutes. Plaintiffs, in response, argued that these statutes had been pre-empted by Title VII and could not therefore sanction defendant's conduct.

At the Court's invitation, the State of Louisiana then filed a brief in support of the validity of La.Rev.Stat. §§ 23:311, 332. This, in turn, elicited a surge of brief-writing activity by the EEOC and three other amicae curiae.[2] Having heard the evidence at trial and having considered all the briefs filed, the Court is now ready, albeit hesitant, to venture into the thicket the parties and amicae have unwittingly created.

A. BACKGROUND

As previously mentioned, this case arises out of the refusal of the Telephone Company to consider plaintiffs' bids for promotion to the job of test deskman. The evidence adduced at trial, together with the four stipulations of fact agreed on by the parties, discloses that the test deskman is a central figure in handling equipment malfunctions for the Telephone Company. A customer's complaint of a malfunction is received by a repair clerk who fills out a "trouble ticket" describing the nature of the complaint. The "trouble ticket" is then given to a test deskman who analyzes the complaint. This is basically done through the use of a Type 14 Local Test Desk - a piece of electronic equipment with which the deskman can analyze the resistance or capacity along the telephone lines and hopefully determine where the trouble lies. After the test deskman locates the apparent malfunction, he dispatches a telephone repairman to that location and works with him, if necessary, to further pinpoint the location of the malfunction. When the repairs have been completed, the test deskman will recheck the line with the desk set and then notify the customer of the repairs. He then completes the "trouble ticket" by recording the malfunction found, its cause and the repairs needed.

At the time they first bid for the test deskman's job, Mrs. Jenkins was working for the Telephone Company as an assignment clerk, and Mrs. Roig was working as an outside plant clerk. The job of test deskman has a higher wage rate than either of these jobs. Both plaintiffs had worked for their employer at least ten years in these and other jobs and had commendable work records.

The Court believes that both plaintiffs were well qualified to bid for the job of test deskman.

Without considering their qualifications, the Telephone Company declined to consider plaintiffs' bids on the grounds that since the job required an employee to work more than forty-eight hours a week, Louisiana law prohibited it from promoting them or any other women to this job. Plaintiffs attacked this position as an unlawful employment practice by first filing charges with the Equal Employment Opportunity Commission and ultimately by filing these lawsuits.

B. WERE THE TELEPHONE COMPANY'S EMPLOYMENT PRACTICES DICTATED BY STATE LAW?

Plaintiffs first contend that we need not pass on the validity of the Louisiana statutes since they do not apply to the job classification of test deskman or alternatively because defendant is estopped from using the statutes as a defense because it has flaunted their provisions on numerous occasions.

1. Is the position of test deskman exempt from the maximum hour laws?

La.Rev.Stat. § 23:332 provides in part that

> "No female shall be employed in any . . . telephone or telegraph . . . company, . . . for more than eight hours in any one day and not more than forty-eight hours or six days in any consecutive seven day period."

Certain exemptions to this sweeping prohibition are contained in La.Rev.Stat. 23:337 including one for "Females employed as telephone, telegraph, or switchboard operators." Jobs so exempted from the provisions of § 332 are still subject to the provisions of La.Rev.Stat. § 23:311:

> "No female shall be employed in any . . . [occupation exempted from these provisions] for more than nine hours in any one day or fifty-four hours in any one week."

Violations are subject to the criminal penalties contained in La.Rev.Stat. § 23:314.

Plaintiffs claim that a test deskman's duties are essentially those of a telephone, telegraph or switchboard operator,

and consequently exempt from the 48-hour limitation of § 312. Since defendant does not claim that a test deskman consistently works in excess of § 311's 54-hour limit, plaintiffs contend that there is in fact no statutory bar to their promotion.

At the trial both plaintiffs, but especially Mrs. Roig, testified concerning the duties of both operators and test deskmen and concluded that, in their opinion, the jobs were similar. Defendant offered the testimony of Mr. Fred McNeel who had worked for the Telephone Company for 23 years and was currently General Traffic Manager. Based on his experience with the various jobs, he testified in detail concerning the duties of the eight different types of operators employed by the Telephone Company. Essentially, he testified that the operators assist customers in making or completing calls, while the test deskmen assist telephone repairmen in locating and correcting malfunctions in the telephone lines. He concluded that "the duties, responsibilities and skills of a telephone, telegraph or switchboard operator cannot be considered the same or similar to the duties of a test deskman."

Since La.Rev.Stat. § 23:332 was originally intended to be remedial or protective in nature, its exceptions (La.Rev.Stat. § 23:337) are to be construed narrowly. We agree with the defendants that the job of test deskman is too dissimilar from any of the jobs specifically mentioned in § 337 to be considered exempt from the operation of § 332.

2. Is a test deskman required to work more than 48 hours a week?

Plaintiffs contend that an over-forty-eight-hour work week is not a requirement for the job of test deskman; rather, the Telephone Company has arbitrarily and artificially added extra hours to the test deskman's normal work week so as to be able to keep that job category all-male.

Based on the evidence before us, we find that test deskmen at the six test centers in the New Orleans area averaged over 48 hours work a week 42.6% of the time during the period from

December 1964 through August 1966. During this period they averaged more than eight hours work a day 43% of the time. Thus, while test deskmen are assigned an eight-hour shift five days a week, they consistently work in excess of their regular assignments. It is not unreasonable for the Telephone Company to require a prospective test deskman to be able to work overtime.

The Court finds that this overtime is caused primarily because the number of malfunctions fluctuates considerably due to factors (such as storms) beyond the Telephone Company's control; because some malfunctions occur at night when no test deskman regularly works; and because if a repairman has been unable to correct a malfunction by the end of the shift, the test deskman must work overtime to help the repairman locate and repair the malfunction.

Plaintiffs have failed to prove that this overtime condition has been artificially created by either having an insufficient number of test deskmen or by shifting certain duties from other positions, such as repair clerk to the test deskman. While these factors could conceivably inflate the overtime required of a test deskman, plaintiffs have failed to introduce evidence to show these factors existed, or if they existed, what effect they would have on the overtime requirement.

3. Is the Telephone Company estopped from pleading the statute as a defense?

As we understand plaintiffs' final argument as to the inapplicability of the statutes, it is that the Telephone Company, having flaunted the provisions of the statutes when it was convenient to do so, should now be estopped from asserting these statutes as a defense.

At trial, both plaintiffs testified that on several occasions, such as in the aftermath of a hurricane, they and other women worked far in excess of eight hours a day, or forty-eight hours a week. Plaintiffs failed to prove that such overtime was a recurring practice apart from emergency situations while the defendant introduced evidence to show that attempts had been made

to curb even this overtime. Without deciding whether plaintiffs' allegations, if proved, would estop the defendant, we must find that plaintiffs have failed to prove that the Telephone Company engaged in any practice of flaunting the Louisiana protective laws.

Plaintiffs having failed to prove otherwise, the Court finds that the Telephone Company's decision not to consider plaintiffs for the test deskman position was compelled by their desire not to violate La.Rev.Stat. §§ 23:311, 332.

C. THE VALIDITY OF THE LOUISIANA STATUTES

Having concluded that the Telephone Company did in fact rely on the Louisiana protective laws in deciding not to promote plaintiffs, we must now consider the validity of La.Rev.Stat. §§ 23:311, 332.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilcges of employment, because of such individual's sex." 42 U.S.C. § 2000e-2(a)(1). The Telephone Company has admitted that it did not consider promoting the plaintiffs because of their sex and thereby committed a prima facie violation of the Act. The Telephone Company argues that their good faith reliance on the Louisiana protective laws should preclude the plaintiffs from obtaining any affirmative relief as against the Telephone Company. Rather, the plaintiffs are limited, the Telephone Company argues, to obtaining a judgment declaring that as to the Telephone Company, the Louisiana protective laws have been pre-empted by Title VII. If the plaintiffs obtain such an order, the Telephone Company has agreed to consider both plaintiffs for the next vacancy in the test deskman's position.

Unlike other defendants in similar suits, the Telephone Company does not defend the validity of the statute.[3] Rather, they seem to invite what the plaintiffs demand - a judgment declaring at least portions of the statutes invalid under the Supremacy Clause. Into this litigious vacuum, however, has valiantly

stepped the State of Louisiana which filed a brief defending the validity of the state statutes.

The state's first argument is that the employment practices dictated by the Louisiana protective laws constitute a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" and hence are permissible under § 703(e) of the Act. 42 U.S.C. § 2000e-2(e).

This contention is remarkably similar to that recently rejected by the Ninth Circuit in Rosenfeld v. Southern Pacific Co., ___ F.2d ___, 3 EPD ¶ 8247 (9th Cir. 1971). As the Court there pointed out, an employer claiming that a discriminatory practice is a bona fide occupational requirement has the burden of proving that the qualification - in this case sex - is necessary in a specific case to enable an employee to fulfill the duties of a specific job. The burden is not met by simply alleging on the basis of stereotyped characterizations that women as a class cannot, because of physical or sociological reasons, engage in certain types of work. Weeks v. Southern Bell Telephone & Telegraph Company, 408 F.2d 228 (5th Cir. 1969). As stated by the EEOC in its guidelines:

> "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 C.F.R. § 1604.1(a)(1)(ii).

Here, no allegation has been made that the sex of either plaintiff would prevent her from performing any of the duties of a test deskman. Rather, we have the treadworn assertion of the state that "there are differences between the sexes . . . sociological, physiological and biological . . . which justify rational generic classification," (brief at 5) and that a prohibition on women working in excess of eight hours a day or forty-eight hours a week is such a rational generic classification. We join with courts across the nation in condemning such "stereotyped classifications" as failing to constitute a bona fide occupational qualification and hence as unlawful employment practices in violation of Title VII.[4]

Alternatively, the state argues that Congress did not intend in passing Title VII to pre-empt the entire field of employer-

continuing vitality of certain state laws. The state relies on § 708 and § 1104 to uphold their protective laws. Section 708 provides that:

> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C. § 2000e-7.

Section 1104 is somewhat similar:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

These contentions were also rejected in Rosenfeld v. Southern Pacific Company, supra. See also, Local 246, Utility Workers v. Southern California Edison Company, 320 F.Supp. 1262 (C.D.Cal. 1970). We agree with those courts that these sections were intended to save those state laws which aimed at preventing employment discrimination and not state laws such as these which "purports to require . . . an unlawful employment practice under this subchapter" or which are "inconsistent with any of the purposes of this Act."

These statutes then clearly regulate a field which Congress has entered by enacting Title VII of the Civil Rights Act of 1964. Where state and federal law conflict, as here, the state law must be held to have been pre-empted by the federal law through the operation of the Supremacy Clause of the United States Constitution. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Therefore, insofar as any of the provisions of La.Rev.Stat. §§ 23:311, 314, 332 and 337 conflict with any of the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C., §§ 2000e, et seq., they are invalid under the Supremacy Clause. Where Title VII has not occupied the field, such as where the employer has fewer than twenty-five employees, the Louisiana statutes maintain their validity.[5]

D. APPROPRIATE RELIEF

Having found that the defendant, Telephone Company, engaged in employment practices violative of Title VII, we must next consider to what relief, if any, plaintiffs are entitled.

In their complaint plaintiffs prayed for an injunction prohibiting the defendant from continuing to engage in unfair employment practices and requiring defendant to promote them to test deskmen and accord them the job benefits and privileges to which they would now be entitled had no discrimination occurred, for damages for lost wages and similar job credits and for attorneys' fees. It was stipulated by the parties that in the event the Court determines that damages and attorneys' fees are appropriate, their quantum would be determined at a future hearing.

1. Injunctive Relief

Since the plaintiffs were victims of an unlawful employment practice, this Court would normally consider enjoining the continuation of such practice and ordering that the plaintiffs be considered for promotion to the next available test deskman vacancy. These parties, however, have jointly stipulated that in the event the Louisiana protective laws are declared invalid by the Court, the defendant will promote the plaintiffs to the next vacancy if they are qualified. This appears to us to moot out the issue of injunctive relief. However, the Court will reserve ruling on this issue in the event the stipulation agreed to does not effectively terminate as to the plaintiffs the effects of defendant's unfair employment practices.

2. Damages

The remedial provisions of Title VII provide that

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . ." 42 U.S.C. § 2000e-5(g)

Both the Fifth Circuit and this Court have long recognized that the statutory requirement that the employer "has intentionally engaged in" an unlawful employment practice "requires only that the defendant meant to do what he did, that is, his employment practice was not accidental." Local 189, United Papermakers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), aff'g 301 F.Supp. 906 (E.D.La. 906).[6] Here, the Telephone Company never claimed that its policy relative to the promotion of women was accidental but admitted that the policy was deliberate albeit compelled by state law. Hence, plaintiffs have made out a prima facie case for the recovery of damages.

However, the Court in its discretion will limit plaintiffs' relief to an order declaring the protective statutes invalid and will not award damages or additional injunctive relief. While this Court has long advocated a liberal application of Title VII's remedial provisions as necessary to effectuate the intent of Congress, see e.g., Local 189, United Papermakers v. United States, supra, we think that several factors combine here to make damages and injunctive relief inappropriate. First, it is our conclusion that the Telephone Company was acting in good faith and that their employment practices were compelled by the state protective laws. This conclusion is buttressed by evidence that in states having no protective laws, the Telephone Company does promote women to the test deskman position and that they are willing to consider these plaintiffs for the job if the statute is declared invalid. In the circumstances of this case, the Telephone Company should not be liable in damages for its good faith attempt to comply with existing state statutes validly enacted and presumed constitutional[7] and "for its failure to predict the future course of constitutional law." Ridinger v. General Motors, 325 F.Supp. 1089, 1098 (S.D.Ohio 1971). Accord, Rosenfeld v. Southern Pacific Co., ___ F.2d ___ 3 EPD ¶ 8247 (9th Cir. 1971); Kober v. Westinghouse Electric Corp., 325 F.Supp. 467 (W.D.Pa. 1971); Richards v. Griffith Rubber Mills,[8] 300 F.Supp. 338 (D.Ore. 1969).

3. ATTORNEYS' FEES

Section 706(K) of Title VII allows the Court in its discretion to award reasonable attorneys' fees to the prevailing party. 42 U.S.C. § 2000e-5(k). There is no requirement that the prevailing party be the victim of intentional discrimination.

The courts have uniformly awarded attorneys' fees in these cases even where the prevailing party was unable to recover back pay or other damages because the defendant was relying in good faith on a state statute. Ridinger v. General Motors Corp., supra; Local 246, Utility Workers v. Southern California Edison Co., 320 F.Supp. 1262 (C.D.Cal. 1970); Richards v. Griffith Rubber Mills, supra. See also, Clark v. American Marine Corp., 320 F.Supp. 709 (E.D.La. 1970). This is a recognition of the congressional purpose to have Title VII enforced in large part by the individuals wronged acting as private attorneys general. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968). Awarding attorneys' fees to the prevailing party is one way of insuring that this congressional intent will be effectuated and that individuals will not be deterred from bringing Title VII suits. These plaintiffs having been the victims of an unlawful employment practice, it is only fair that they be allowed to recover the considerable sums they have expended to vindicate not only their rights but also the rights of many other working women.

By joint stipulation, the parties have reserved the determination of the amount of the attorneys' fees for a future hearing. If the parties do not agree on the amount within thirty days of entry of judgment, the Court will then set a hearing to fix the amount of the attorneys' fees.

Plaintiffs will prepare a proposed judgment in accordance with this opinion and submit it to opposing counsel for approval within one week. It should be submitted to the Court, with the approval of the defendant or with a statement of the grounds of its opposition, within three days thereafter. Upon submission of the proposed judgment, a judgment will be entered in favor of

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The Telephone Company's challenges to this Court's jurisdiction were earlier denied. The Court reaffirms its earlier findings that the plaintiffs timely complied with the jurisdictional prerequisites of Title VII.

2
By leave of Court, the National Organization of Women, the Communications Association for Equal Opportunity, Inc., and the Women's Equity Action League filed briefs as amicae curiae. The Court wishes to thank them for their assistance.

3
See e.g., Rosenfeld v. Southern Pacific Co., ___ F.2d ___, 3 EPD ¶ 8247 (9th Cir. 1971); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969); Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D.Ore. 1969). Some employers have, however, taken affirmative action to have these protective laws declared invalid. See e.g., Caterpillar Tractor Co. v. Grabiec, 317 F.Supp. 1304 (S.D.Ill. 1970).

4
Maximum hour and weight laws have been invalidated in the following cases. Rosenfeld v. Southern Pacific Co., ___ F.2d ___, 3 EPD ¶ 8247 (9th Cir. 1971); Ridinger v. General Motors Corp., 325 F.Supp. 1089 (S.D.Ohio 1971); Kober v. Westinghouse Electric Corp., 325 F.Supp. 467 (W.D.Pa. 1971); Garneau v. Raytheon Co., 323 F.Supp. 391 (D.Mass. 1971); Local 246, Utility Workers v. Southern California Edison Co., 320 F.Supp. 1262 (C.D.Cal. 1970); Caterpillar Tractor Co. v. Grabiec, 317 F.Supp. 1304 (S.D.Ill. 1970); Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D.Oreg. 1969). Cf., Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969), invalidating company protective regulations. Contra, Jones Metal Products Co. v. Walker, 25 Ohio App. 2d 141 (1971). Additionally, many states now consider their protective laws as pre-empted by Title VII. See e.g., 3 EPD ¶ 5108 (1969) (Opinion of Michigan Attorney General).

5
We expressly do not consider the validity of the statutes under the Fourteenth Amendment. Muller v. Oregon, 208 U.S. 412 (1908).

6
There is disagreement among the Circuit Courts of Appeal over the meaning of this intent requirement. Compare, Sprogis v. United Air Lines, ___ F.2d ___, 3 EPD ¶ 8239 (7th Cir. 1971) and Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) which follow the Fifth Circuit in construing "intentionally engaged in" as requiring only a deliberate as opposed to an accidental practice, withDewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) citing Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D.Ore. 1969) which construed intentionally to mean wilfully and knowingly.

7
See, Pierson v. Ray, 386 U.S. 547 (1967) granting police officers immunity from civil damage suits if they act under a statute which they reasonably believe to be constitutional but which is later declared invalid.

8
We are mindful of the failure of the Telephone Company to take affirmative action to either secure an exemption from state law coverage or to seek a declaratory judgment as to the validity of the laws. See, Kober v. Westinghouse Corp., 325 F.Supp. 467

(W.D.Pa. 1971). However, in the circumstances of this case, the Court does not feel that this failure to act affirmatively should render the Telephone Company liable for damages.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

October 4, 1971

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARY LOU SCHAEFFER,
Plaintiff-Appellant,

vs.

SAN DIEGO YELLOW CABS, INC., etc., et al.,
Defendants-Appellees.

No. 71-1442

MARY LOU SCHAEFFER,
Plaintiff-Appellee,

vs.

SAN DIEGO YELLOW CABS, INC., etc., et al.,
Defendants,

No. 71-1944

DIVISION OF INDUSTRIAL WELFARE & INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA,
Intervenor Defendant-Appellant.

[June 20, 1972]

Appeal from the United States District Court for the Southern District of California.

Before: BARNES, WRIGHT, Circuit Judges, and BYRNE, District Judge.*

BARNES, Circuit Judge:

Plaintiff Mary Lou Schaeffer brought this action against her employer, San Diego Yellow Cabs, Inc. (hereinafter the Company), under the Equal Employment Opportunities Act, Title

*The Honorable William M. Byrne, Sr., United States District Judge, Central District of California, sitting by designation.

VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* Plaintiff alleged that the Company had unlawfully discriminated between the sexes by refusing to permit her to work as many hours per day as male employees were permitted to work.

The jurisdiction of the lower court was based upon 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f). Jurisdiction in this court exists under 28 U.S.C. § 1291.

Plaintiff Schaeffer was employed by the defendant Company as a taxicab driver on March 18, 1966. In October of 1966, Schaeffer requested that she be permitted to work 9-hour days. The Company refused as, at that time, it did not permit any of its female drivers to work more than 8-hour days, though male drivers were allowed to work 9-hour days. This limitation on female drivers was in compliance with Section 1350 of the California Labor Code, and Transportation Order No. 9-68 of the California Industrial Welfare Commission, 8 Cal. Admin. Code § 11460.

In January of 1967, Schaeffer filed charges of discrimination with the Equal Employment Opportunity Commission (hereinafter the Commission or E.E.O.C.). Her charge was rejected as the Commission concluded that the California statutes were valid. In January of 1968, she filed another charge with the Commission on the same grounds. While this second charge was pending, and on November 22, 1968, the case of *Rosenfeld v. Southern Pacific Company*, 293 F. Supp. 1219 (C.D. Cal. 1968) was decided. *Rosenfeld* dealt with sex discrimination in employment, and held that various provisions of the California Labor Code, including § 1350, were invalid as conflicting with the Equal Employment Opportunities Act. On January 22, 1969, the Commission reversed its previous ruling and found that there was reasonable cause to believe that the Company was committing unlawful employment practices.

In September of 1969, Schaeffer received notice from the Commission that attempts to secure voluntary compliance had failed, and that she could institute a civil action. On October 7, 1969, the Company announced to its female drivers that they would be allowed to work full 9-hour days like the male drivers.

On the same day, plaintiff Schaeffer filed her complaint. She named as defendants the Company and her union, the Transpor-

tation and Allied Workers of California.[1] She sought in her complaint, one, a declaration that Sections 1350 and 1350.5 of the California Labor Code, and Transportation Order No. 9-68 of the California Industrial Welfare Commission were invalid; two, an injunction directing the Company to allow her to work 9-hour days; three, damages for the amount of pay she would have earned if she had been permitted to work 9-hour days since October 15, 1966; and four, attorney's fees and costs.

Following a trial, the court below entered its judgment declaring the California "hours" laws and regulations invalid, and awarding plaintiff $600 attorney's fees. The court denied damages for the lost work time, and refused to issue an injunction in light of the Company's change in policy. Schaeffer filed appeal No. 71-1442, challenging the refusal to award damages and the allowance of only $600 in attorney's fees. The Commission was permitted to file an *amicus curiae* brief.

The Division of Industrial Welfare and the Industrial Welfare Commission of the State of California (hereinafter California) then sought to intervene as defendants in order to attack the court's rulings on the validity of the statutes and regulations. Eventually, the court granted the motion to intervene, but denied the request for relief. California then filed appeal No. 71-1244.

I. *Appeal No. 71-1244*

After judgment was entered by the district court and the appeals were filed, this court on June 1, 1971, handed down its opinion in *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971). In *Rosenfeld*, we held that, under the provisions of 42 U.S.C. § 2000e-7, state legislation could not justify discriminatory treatment of women in employment practices which conflicted with federal law. The State of California decided not to appeal this decision to the United States Supreme Court. Instead, it announced on June 24, 1971, that it would no longer enforce the maximum hours provisions of Sections 1350 and 1350.5.

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[1]The union's motion for summary judgment was granted, and it is not a party in either appeal.

Consequently, the State of California informed this court that in this case it no longer desired to press its claim that those sections of the Labor Code did not conflict with Title VII of the Civil Rights Act of 1964, and withdrew any claim the state statutes are valid. However, California wishes to continue its attack on the jurisdiction of the district court to declare Sections 1350 and 1350.5 invalid. California argues that no case or controversy existed in the district court on this issue as neither the Company nor the union, the two original defendants, were maintaining the validity of those statutes. It was only after the judgment was entered by the district court, and California intervened, that any arguments in defense of the statutes were presented.

We decline to reach the issue urged by California on appeal. By conceding that the state maximum hours statutes in question conflict with federal law, California has effectively mooted the issue of the district court's jurisdiction to rule on the validity of these statutes.

While plaintiff Schaeffer is named as appellee in appeal No. 71-1944, she no longer is directly interested in the question of the *jurisdiction* of the court below *to determine the validity of the California statutes.* No one challenges the jurisdiction of that court to rule upon Schaeffer's claim for damages. As the invalidity of the California statutes is now admitted, any action by this court, either affirming or reversing the district court's jurisdiction to consider the issue of the validity of the California statutes, cannot affect Schaeffer's appeal on the issue of damages.

California's sole purpose in pursuing this appeal is to obtain a ruling on the scope of a district court's jurisdiction to declare a state statute invalid when the state is not joined as a party. If we made such a ruling, it would be merely an advisory opinion, for no "live" controversy exists between California and Schaeffer.

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *Local No. 8-6, Oil, Chemical and Atomic Workers, etc. v. Missouri,* 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed. 2d 373 (1960)." *Rosenfeld v. Southern Pacific Company,* 444 F.2d at 1221.

Therefore, we dismiss appeal No. 71-1244 on the grounds that it does not present a case or controversy between the parties to this action.

II. *Appeal No. 71-1442*

A. BACK PAY

Plaintiff Schaeffer contends that under § 706(g) of Title VII of the Civil Rights Act of 1964,[2] she is entitled to back pay for the hour per day she was prevented from working by her employer. The *amicus* brief filed by the Commission deals almost exclusively with material supporting Schaeffer's damages claim.

Liability under § 706(g) only attaches to an employer who intentionally engages in an unlawful employment practice. We agree with the Fifth, Seventh, and Tenth Circuits, and adopt a broad interpretation of the term "intentionally" to include all employment practices engaged in deliberately rather than accidentally. *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The practice of the Company in allowing men to work longer than women comes within this interpretation of § 706(g). The fact that the Company may have been relying on a state statute does not make their actions any less of a violation under § 706(g). *LeBlanc v. Southern Bell*, 333 F.Supp. 602 (E.D. La. 1971).

However, the conclusion that the company violated § 706(g) does not automatically entitle Schaeffer to the damages she demands. A court may enjoin and may award damages, but should

[2] "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)." 42 U.S.C. § 2000e-5(g).

only order affirmative action, such as back pay, when such relief is "appropriate". In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunities Act, and the fundamental concepts of fairness.

The Company argues that reliance on a state statute which the employer believes in good faith to be enforceable should serve as a complete defense to damages for back pay. *LeBlanc v. Southern Bell, supra; Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D. Penn. 1971); *Ridinger v. General Motors Corporation*, 325 F.Supp. 1089 (S.D. Ohio 1971).

Plaintiff and the Commission respond that the purpose of the Equal Employment Opportunities Act is better served by showing preference to the innocent employee over the innocent employer. They argue that to permit the defense claimed by the Company would discourage employees from attacking unlawful practices involving state statutes by removing an important financial incentive. The Commission cites a number of cases under the Fair Labor Standards Act and the National Labor Relations Acts which hold that lack of intent to violate federal labor statutes and good faith reliance on orders of administrative agencies are not defenses to claims for back pay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969); *Hodgson v. American Can Co.*, 440 F.2d 91 (8th Cir. 1971); *Schultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *American Machinery Corp. v. NLRB*, 424 F.2d 1321 (5th Cir. 1970); *Laidlaw Corp v. NLRB*, 414 F.2d 99 (7th Cir. 1969); *Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968).

Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good-faith employer.

When Schaeffer first requested permission to work 9-hour days in October of 1966, the Company would have been required to violate a state statute in order to grant her request. Under the generally prevailing conception of the scope of Title VII, it was

reasonable for the Company to assume that the state statutes involved were valid, and could be successfully enforced. The Commission's rejection of Schaeffer's charges in 1967 supported the Company's actions.[3] When Schaeffer filed her second charge in January of 1968, the basic situation was the same.

However, on November 22, 1968, the district court issued its opinion in *Rosenfeld v. Southern Pacific Company*, 293 F.Supp. 1219 (C.D. Cal. 1968). The Company admits that it knew of this case shortly after it was decided. In January of 1969, the Commission reversed its position and concluded that there was probable cause to believe that the Company was engaged in an unlawful employment practice.

We believe that by the time the Company had notice of both the *Rosenfeld* decision in the district court and the Commission's reversal in policy, reliance upon the state statute in continuing to deny Schaeffer the right to work 9-hour days could no longer be considered to be in good faith and serve as a defense against the damages claim.[4] We conclude, therefore, that Schaeffer is entitled to receive back pay for the extra hour per day from the date when the Company had knowledge of both the *Rosenfeld* case and the Commission's decision in favor of Schaeffer (i.e., on some undetermined date subsequent to 1/22/69, to and including 10/7/69, the date the company allowed 9-hour daily employment for women).

We reject the argument that an employer should not be held for claims of back pay until a "final" court decision, such as our decision in *Rosenfeld* in June of 1971. It is unfair to force an

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[3]Under the regulations promulgated by the Equal Employment Opportunities Commission and in effect in 1965-1969, the state statutes involved here would have been considered valid. 29 C.F.R. § 1604.1(b) and (c), 30 Fed. Reg. 14927 (Dec. 2, 1965). Although the Commission reversed its thinking in this matter about 1968, it was not until mid-1969 that the regulations were amended. 29 C.F.R. § 1604.1(b), 34 Fed. Reg. 13368 (Aug. 11th, 1969).

[4]We reject the idea advanced by the Commission that the Company should be held responsible for failing to file a declaratory judgment action against the state to obtain a ruling on the validity of the statutes. A company in such a case cannot always, and perhaps never can, be expected to press a claim on behalf of its employees with sufficient fervor to insure an adequate presentation of the merits of the claim before the court.

innocent employee to forego his rights under law while litigation drags through the courts (which, in the *Rosenfeld* case, took nearly three years).

We do not understand that our earlier statements in *Rosenfeld's* penultimate paragraph (concerning prospective application of that decision) to bar the result we reach in this case. 444 F.2d at 1227. We are not applying the *Rosenfeld* decision retroactively. The Company was in violation of federal law for a certain time prior to the date this suit was filed. *Rosenfeld* did not intend to automatically forgive all violations of Federal law that occurred prior to that decision. Plaintiff in this case had filed her suit in the district court well before the decision in *Rosenfeld* by this court. We stated in *Rosenfeld* that our decision would not necessarily affect actions pending prior to our decision. 444 F.2d at 1227.

As stated we feel that a proper balance between the Company and Schaeffer would be had by holding the Company liable for damages from the time it had notice of the district court's decision in Rosenfeld and the Commission's reversal in position, up to and including 10/7/69. We therefore remand this case to the district court so that it may reopen the matter, take testimony, and calculate the amount of damages.

B. ATTORNEY'S FEES

Section 706(k) of Title VII grants a district court discretion to allow the prevailing party reasonable attorney's fees. The court below awarded Schaeffer $600 in attorney's fees, though an itemized claim for $2,220 was submitted. The court stated no reasons for allowing less than one-third of the claimed fees, but it was not required to do so.

The allowance of reasonable fees in civil rights cases is an important feature of the enforcement provisions of that Act. See *Newman v. Piggie Park Enterprises, Inc.*, 390 US 400 (1968). The amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices. However, the amount of the award should also be proportionate to the extent to which the plaintiff prevails in the suit. We believe that the district court should reconsider the award of

attorney's fees in light of our decision that plaintiff is entitled to a small portion of the back pay claimed by her. We do not intend to express any opinion whether the amount of fees to be awarded should or should not be enlarged over the amount heretofor allowed. We recognize a large discretion on such matters rests with the trial court, guided by the usual principles of how such matters are determined.[5]

Appeal No. 71-1442 is *reversed* and remanded for further proceedings suggested herein.

Appeal No. 71-1244 is *dismissed.*

BYRNE (dissenting):

I respectfully dissent from that part of the opinion in Appeal No. 71-1442 relating to the allowance of damages.

This controversy should be added to the ranks of those cases which recognize that employers acting pursuant to obligatory state laws cannot be deemed to have intentionally violated Section 706(g) of Title VII. *LeBlanc v. Southern Bell,* 333 F. Supp. 602 (E.D. La. 1971); *Kober v. Westinghouse Electric Corp.,* 325 F. Supp. 467 (W.D. Penn. 1971); *Ridinger v. General Motors Corporation,* 325 F. Supp. 1089 (S.D. Ohio 1971); *Richards v. Griffith Rubber Mills,* 300 F. Supp. 338 (D. Ore. 1969).

The fact that Yellow Cab continued to rely on state law after the District Court ruling in *Rosenfeld* does not alter its position. This court, in affirming Judge Ferguson's ruling, acknowledged that such lower court decisions do not, *ipso facto,* relieve employers of their fealty to state law:

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[5]Although no attorneys' fees were requested by appellant Schaeffer on this appeal, the Commission draws our attention (by letter subsequent to argument) to the case of *Malone v. North American Rockwell Corporation,* ..... F.2d ....., (No. 26009, decided by this court on March 23, 1972). The statute (42 U.S.C. § 2000e-5(k)) is available only to the appellant Schaeffer and is couched in permissive language. Under the particular circumstances of this case, we award no attorneys' fees, as costs, on this appeal. Appellant is entitled to her ordinary costs, as the prevailing party.

"Moreover, in view of the California statutes referred to above, the conclusion that the company engaged in 'discrimination' in refusing to assign plaintiff to the Thermal position carries with it no invidious connotation. Prior to a judicial determination such as evidenced by *this* opinion, an employer *can hardly be faulted for following the explicit provisions of applicable state law.*" (emphasis added)

Rosenfeld v. Southern Pacific Co., 444 F.2d at 1227.

Here, the district court found the acts of sex discrimination committed by the Yellow Cab Company were the product of good faith reliance upon the laws of California and not intentional commission of unlawful employment practices. Accordingly, the court found that damages for loss of wages for the period of time when the restriction operated was "not authorized".

The majority adopts the argument of the plaintiff that if there are two innocent parties to a controversy, preference should be shown to the innocent employee over the innocent employer.

If both are innocent, why should either be penalized?

I would affirm.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-295

GLORIA KENDALL LEBLANC and
HELEN JENKINS ROIG,
Petitioners,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH
COMPANY and STATE OF LOUISIANA,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

MICHAEL J. MOLONY, JR.,
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SUBJECT INDEX

Page

TABLE OF AUTHORITIES i

QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 5

CONCLUSION 10

APPENDIX A 1a

TABLE OF AUTHORITIES

Cases:

Bowe v. Colgate-Palmolive Company, 416 F.2d 711 (7th Cir. 1969) 8

Cheatwood v. South Central Bell Telephone Co., 303 F.Supp. 754 (M.D. Ala. 1969) 10

Kober v. Westinghouse Electric Corp., 325 F. Supp. 467 (W.D. Pa. 1971) 9, 10

Manning v. General Motors Corp., ____ F.Supp. ____, 3 FEP 968 (N.D. Ohio, 1971) 9, 10

Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969) 9, 10

Ridinger v. General Motors Corp., 325 F.Supp. 1089 (S.D. Ohio, 1971) 9, 10

Rinehardt v. Westinghouse Electric Corp., ____ F.Supp. ____, 3 FEP 851 (N.D. Ohio, 1971) 9, 10

Rosenfeld v. Southern Pacific Company, 293 F. Supp. 1219 (C.D. Calif., 1968), aff'd, 444 F.2d 1219 (9th Cir. 1971) 9, 10

TABLE OF AUTHORITIES (Continued)

Cases: Page

Schaeffer v. San Diego Yellow Cabs, Inc., ____ F.2d ____, 4 FEP 946-950 ..... 5, 6, 7

Ward v. Luttrell, 292 F.Supp. 162 (E.D. La., 1968) 7

Weeks v. Southern Bell Telephone and Telegraph, 408 F.2d 228 (5th Cir. 1969) 10

Statutes:

42 U.S.C. §2000(e), et seq. 3

Section 706, 42 U.S.C. §2000e-5(g) 8

Louisiana Revised Statutes 23:311 ..... 1a

Louisiana Revised Statutes 23:314 ..... 1a

Louisiana Revised Statutes 23:332 ..... 1a

Louisiana Revised Statutes 23:336 ..... 2a

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

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GLORIA KENDALL LEBLANC AND HELEN JENKINS ROIG,

Petitioners,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY AND STATE OF LOUISIANA,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent accepts petitioner's reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

QUESTION PRESENTED

Whether the Court of Appeals erred by refusing to find the District Court abused its discretion by not awarding damages.

STATEMENT OF THE CASE

Respondent is engaged in providing telephone and related services in Louisiana, Tennessee, Kentucky,

Alabama and Mississippi (A. 152-153). One of the jobs involved in the maintenance function is that of test deskman, "a central figure in handling equipment malfunctions for the Telephone Company" (A. 202; 30-34). Because of the duties of the test deskman, the company cannot limit the hours of employees in that job to 8 and/or 9 hours a day. This is caused primarily "because the number of malfunctions fluctuates considerably due to factors (such as storms) beyond the Telephone Company's control; because some malfunctions occur at night when no test deskman regularly works; and because if the repairman has been unable to correct a malfunction by the end of the shift, the test deskman must work overtime to help the repairman locate and repair the malfunction" (A. 205; 30-34).

Since 1908 the State of Louisiana has had in force statutes limiting the number of hours female employees can work. Since 1942 these statutes have restricted the number of hours female employees can work in certain jobs to 8 hours a day or 48 hours a week, and have provided a blanket restriction for female employees in all other jobs of 9 hours a day or 54 hours a week. Violations of the statutes are punishable by both fine and imprisonment (Appendix A, attached).

Because of the state criminal statutes limiting the number of hours female employees can work, respondent Telephone Company adopted and enforced a policy prohibiting the assignment of female employees to the job of test deskman in Louisiana (A. 152). In other states not having statutory restrictions on the number of hours female employees can work, the company as-

signed female employees to the test deskman job (A. 152-153).

Pursuant to that policy, respondent Telephone Company rejected petitioners' bids for the test deskman job (A. 41-43). Thereafter, petitioners filed charges with the Equal Employment Opportunity Commission alleging the rejection violated Title VII of the civil rights statute (A. 41-43). On February 16, 1967 the EEOC issued its decision (A. 249-253). The Commission concluded the Telephone Company's refusal to promote petitioners to the test deskman job violated Title VII of the Civil Rights Act solely because the test deskman job did not require hours in excess of those permitted by the state statute, and in any event, the duties of the test deskman job are similar to those of a switchboard operator and are, therefore, exempt from the 8 hour limitation. Both of these findings were rejected by the District Court and were not appealed. Nowhere in the Commission's decision did the Commission find the state statute was invalid or that the company would not be subjected to possible criminal prosecution for failing to obey the statute.

Thereafter, petitioners filed these proceedings in the Federal District Court under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), et seq. alleging respondent's refusal to consider their bids for the test deskman job constituted unlawful sex discrimination.

The District Court held the state statutes were preempted by Title VII of the Civil Rights Act of 1964, but

rejected plaintiff's claim for damages on the following grounds:

> "[W]e think that several factors combine here to make damages and injunctive relief inappropriate. First, it is our conclusion that the Telephone Company was acting in good faith and that their employment practices were compelled by the state protective laws. This conclusion is buttressed by evidence that in states having no protective laws, the Telephone Company does promote women to the test deskman position and that they are willing to consider these plaintiffs for the job if the statute is declared invalid. In the circumstances of this case, the Telephone Company should not be liable in damages for its good faith to comply with the existing state statutes validly enacted and presumed constitutional and 'for its failure to predict the future course of constitutional law.'" (A. 210)

The Court of Appeals affirmed for the following reasons:

> "Congress granted broad discretion to the District Court to fashion remedies in Title VII cases as the equities of the particular case compel. The plaintiffs have not sustained their burden of showing that the District Court abused this discretion in declining to allow back pay for the reasons set forth in its opinion." (Appendix A to the Petition)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Certiorari should not be granted because this is not an appropriate issue for decision by the Supreme Court.

The issue presented is whether under the facts of this case the District Court abused its discretion by not awarding damages. Contrary to petitioners' assertion, the decision is not precedent for the general proposition that damages should not be awarded in Title VII cases. Rather, the decision recognizes the District Court's discretion to determine the scope of the relief and concludes that in the particular circumstances of this case the District Court did not abuse its discretion. For the Supreme Court to undertake the weighing process necessarily involved in the decision of this issue is not appropriate and the assumption of jurisdiction over such issues would quickly result in an overburdening of the Court's processes.

2. There is no conflict between the Court of Appeals' decision in this case and the decision by the Ninth Circuit in *Schaeffer v. San Diego Yellow Cabs, Inc.*

The primary reason offered by petitioners in support of their petition is that the Court of Appeals' holding in this case conflicts with the holding by the Ninth Circuit in the *Schaeffer* case (a copy of which is attached to the Petition as Appendix C).

It is submitted a close reading of the decision reveals to the contrary. In *Roig,* the court specifically recognized the issue is whether the District Court abused its discretion:

> "Congress granted broad discretion to the District Court to fashion remedies in Title VII as the equities of the particular case compel. The plaintiffs have not sustained their burden of showing that the District Court abused its discretion in declining to allow back pay for the reasons set forth in its decision." (Appendix A of the Petition, p. 17).

The Ninth Circuit Court of Appeals in *Schaeffer* characterized the issue confronting it in a similar manner:

> "However, the conclusion that the company violated Section 706(g) does not automatically entitle Schaeffer to the damages she demands. A court may enjoin and may award damages, but should only order affirmative action, such as back pay, when such relief is 'appropriate'. In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunity Act and the fundamental concepts of fairness." (Appendix C to the Petition, p. 36-37).

The fact that two Courts of Appeal applying essentially the same test to determine whether a lower court abused its discretion come to different results cannot be considered a conflict between the two circuits.

This is even more particularly true here in view of the significant differences between the circumstances present in the *Schaeffer* case and those present here. In *Schaeffer,* the employer continued to limit the overtime of female employees after the precise California state statute involved was declared invalid by a District Court in another case. On the other hand, in *Roig,* no court had held the statute invalid until the District Court in the *Roig* case issued its decision. On the contrary, when the plaintiffs in another case, *Ward v. Luttrell,* 292 F. Supp. 162 (E.D. La. 1968) sought to enjoin the State of Louisiana from enforcing the Louisiana maximum work hours laws applicable to women on the grounds the statutes were discriminatory and violative of the due process and equal protection clauses, a three judge court issued an order dissolving the court on the grounds that the constitutional question was substantial. Thus, unlike the *Schaeffer* case, the respondent in *Roig* was still exposed to possible criminal prosecution for violation of the state statute.

Further, in *Schaeffer,* even though another District Court had found the state statute was invalid, the Court of Appeals concluded the company should not be ordered to pay damages until after a subsequent decision by the Equal Employment Opportunity Commission was issued specifically finding the state statute was invalid and that compliance with the statute con-

stituted a violation of Title VII. No such decision has ever been issued by the Commission in this case.

At page 13 of their brief, petitioners also remark that the Seventh Circuit awarded back pay "under the same circumstances as are presented here" in *Bowe v. Colgate-Palmolive Company,* 416 F.2d 711 (7th Cir. 1969). A closer reading of the *Bowe* decision reveals, however, that the company in *Bowe,* on its own volition, adopted a requirement that female employees could not be placed in jobs requiring the lifting of more than 35 pounds. There was no federal-state dilemma as is present in the instant case (see 416 F.2d 717, at Footnote 5).

3. Certiorari should not be granted because the Court of Appeals' decision is correct.

The discretionary nature of the District Court's power to determine the appropriate relief in a Title VII proceeding under the provisions of Section 706, 42 U.S.C. §2000e-5(g) is fully established by Congressional use of the word "may" rather than "shall". This is further buttressed by Senator Dirksen's comments on the section:

> "This subsection dealing with a decision of the court has been modified to require that the court find the respondent has intentionally engaged in the alleged practice as a condition for the granting of relief. The *mandatory requirement* for affirmative action, including reinstatement and back pay, upon finding of a vio-

> lation *has been revised to read 'may* * * * order such affirmative action as *may* be appropriate, which may include reinstatement and back pay," [Emphasis added; 110 Cong. Rec. 12819 (daily ed. June 5, 1964), (Remarks of Senator Dirksen)]

Although petitioners argue a District Court must award damages if it finds a violation, the statutory wording and legislative history clearly establishes to the contrary. Judicial acceptance of this principle is now beyond question. Every court considering the issue in circumstances similar to those presented here has concluded it has discretionary power to determine the nature of the remedy. *Ridinger v. General Motors Corp.*, 325 F.Supp. 1089 (S.D. Ohio, 1971); *Manning v. General Motors Corp.*, ____ F.Supp. ____, 3 FEP 968 (N.D. Ohio, 1971); *Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D. Penn. 1971). See also, *Rinehardt v. Westinghouse Electric Corp.*, ____ F.Supp. ____, 3 FEP 851 (N.D. Ohio, 1971); *Rosenfeld v. Southern Pacific Company*, 293 F.Supp. 1219 (C.D. Calif., 1968), [affirmed, 444 F.2d 1219 (9th Cir. 1971)]; *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969).

The District Court, after a thorough review of the facts in this case, concluded damages were inappropriate because the Telephone Company was "acting in good faith and that their employment practices were compelled by the state protective laws. This conclusion is buttressed by evidence that in states having no protective laws, the Telephone Company does promote women to the test deskman position and they are will-

ing to consider plaintiffs for the job if the statute is declared invalid."

The evidence fully supports this factual conclusion and was affirmed by the Court of Appeals. Petitioners, by their reference to *Weeks v. Southern Bell Telephone and Telegraph*, 408 F.2d 228 (5th Cir. 1969), and *Cheatwood v. South Central Bell Telephone Co.*, 303 F.Supp. 754 (M.D. Ala. 1969), seek to challenge that factual finding (see p. 10 of petitioners' brief). This, it is submitted, is not an appropriate issue for determination by this Court.

Further, the reasonableness of the District Court's decision and its refusal to award damages is sustained by the fact that every court facing the dilemma of the legal controversy over conflicting state and federal legislation has concluded damages are not appropriate. *Ridinger v. General Motors Corp.*, 325 F.Supp. 1089 (S.D. Ohio, 1971); *Manning v. General Motors Corp.*, ____ F.Supp. ____, 3 FEP 968 (N.D. Ohio, 1971); *Kober v. Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Penn. 1971); *Rinehart v. Westinghouse Electric Corp.*, ____ F.Supp. ____, 3 FEP 851 (N.D. Ohio, 1971); *Rosenfeld v. Southern Pacific Co.*, 293 F.Supp. 1219 (C.D. Calif. 1968) [affirmed, 444 F.2d 1219 (9th Cir. 1971)]; *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DATED: _____

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief for Respondent in Opposition has been served, by depositing same in the United States Mail, postage prepaid, on the following persons:

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Attorney General
State of Louisiana
104 Supreme Court Building
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New Orleans, Louisiana, this __ day of _____, 1972.

_____

FRANK C. ALLEN, JR.

APPENDIX "A"

La. R.S. 23:332 provides:

> "No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, theatre, restaurant, telephone or telegraph or transportation company, or in the operation of passenger or freight elevators, for more than eight hours in any one day and not more than forty-eight hours or six days in any consecutive seven day period."

La.R.S. 23:311 provides:

> "No female shall be employed in any mine, packing house, bowling alley, bootblack establishment, in the distribution of merchandise, in or about any place of amusement where intoxicating liquors are made or sold, or in any other occupation not covered by Sub-part C of this Part, for more than nine hours in any one day or fifty-four hours in any one week."

La.R.S. 23:314 provides:

> "Whoever violates any provisions of this Subpart shall be fined not less than twenty-five dollars nor more than fifty dollars, or imprisoned for not less than ten days nor more than six months, or both."

La.R.S. 23:336 provides:

> "Whoever refuses to exhibit to the commissioner of labor or his authorized representatives the record required by R.S. 23:332 or makes a false statement in connection therewith or in connection with any other matter pertaining to the provisions of this Sub-part, or violates any other provisions of this Sub-part, shall be fined not less than one hundred dollars nor more than two hundred and fifty dollars, or imprisoned for not less than thirty days, nor more than ninety days, or both."